Service Date: July 9, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF The Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc.	))))))	UTILITY DIVISION DOCKET NO. D96.11.200 ORDER NO. 5961c

ORDER ON PETITIONS FOR RECONSIDERATION

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INTRODUCTION

The Montana Public Service Commission (Commission) issued the Arbitration Decision and Order, Order No. 5961b (Arbitration Order), in Docket No. D96.11.200 on March 20, 1997. The Arbitration Order included numerous decisions on unresolved issues identified by the parties and provided a schedule for reconsideration of the Commission's arbitration decisions. The Commission changed the reconsideration schedule pursuant to the request of U S WEST Communications, Inc. (U S WEST). On April 30, 1997, AT&T Communications of the Mountain States, Inc. (AT&T) and U S WEST both filed motions for reconsideration of the Commission's Arbitration Order, followed by responses on May 12, 1997.

AT&T asks the Commission to reconsider its findings and conclusions on 18 issues and to clarify other issues. In light of the enactment of Senate Bill 89 by the Montana Legislature on April 22, 1997, AT&T also asks the Commission to reconsider its decision to establish permanent prices in a generic U S WEST costing and pricing docket and to instead reopen this Docket for the purpose of setting permanent prices for AT&T.

U S WEST requests reconsideration of 19 specific decisions as well as the decision to adopt the AT&T contract. Alternatively, if the Commission rejects its request on the contract issue, U S WEST requests clarification of some of the findings in the Order that arise from the decision to adopt the AT&T contract. U S WEST also requests clarification of contract language on issues the Commission had declined to decide because of the parties' substantial agreement. Finally, U S WEST states that it was prejudiced by the Commission's failure to rule on its motion to compel AT&T's discovery until after the hearing had concluded.

This Order grants reconsideration in part and denies it in part, and clarifies the Arbitration Decision and Order, Order No. 5961b. To facilitate reference to particular issues, this Order is structured in a manner similar to Order No. 5961b. Some additional headings have been included in the order and also in the Table of Contents. New headings are *italicized* in this Order. All headings have been included and when neither party has requested reconsideration of an issue, that is noted as well.

PREHEARING DISCOVERY MOTIONS

Discovery rulings.

1. U S WEST contends that it was prejudiced by the Commission's failure to rule on discovery motions until after the hearing. U S WEST also argues that in the Arbitration Order, the Commission has "simply ignored the reality" of U S WEST's arguments in finding no indication on the record that U S WEST had tried to informally resolve its discovery matter prior to filing the motion to compel. U S WEST maintains that, although there is no transcript of the prehearing conference, it clearly explained the steps it had taken to resolve the discovery dispute in an oral argument on the motion.

2. U S WEST's motion to compel AT&T responses to voluminous data requests was grounded on a technicality in the Procedural Order in this Docket, Order No. 5961a. U S WEST had argued that AT&T's failure to timely object required the Commission to compel discovery responses from AT&T. The Arbitration Order states:

> Unfortunately, the Procedural Order does not permit consideration on the merits under these circumstances. Denial of the motion is preferable to compelling the sort of voluminous information requested by U S WEST, particularly where U S WEST did not argue that it would be prejudiced by failure to grant the motion.

Arbitration Order, ¶ 12. at 6-7. U S WEST did in fact state in its Motion to Compel that AT&T's failure to promptly object placed U S WEST at a severe disadvantage in terms of time to obtain and analyze the information before the hearing. U S WEST elected not to provide a substantive discussion of its objections, however, stating, "Rather than burden the record with a lengthy discussion of those numerous objections, U S WEST will wait to receive the Commission's ruling on this motion." U S WEST's Motion to Compel, at 4.

3. AT&T responded to U S WEST's motion, stating that U S WEST was not disadvantaged because: (1) the vast majority of U S WEST's discovery requests seek information regarding AT&T's costs, when the only costs relevant to this proceeding are U S WEST's; (2) answers were provided to many of the other questions to which AT&T objects despite the objections; and (3) as a result of the agreement between the parties that each may use discovery

materials from Round I, U S WEST was aware of what AT&T's responses to many of the requests would be.

4. U S WEST provided no showing of prejudice, only emphasizing that AT&T had waived its right to object by missing the deadline for filing objections to discovery requests. Rather than compel the responses, the Commission denied the motion pursuant to another provision in the Procedural Order, noting that some of AT&T's late objections appeared to have merit.

5. On reconsideration, the Commission amends the sentence U S WEST objects to, beginning on page six of Order No. 5961b, ¶ 12 as follows, " Denial of the motion is preferable ... where U S WEST did not argue persuasively that it would be prejudiced by failure to grant the motion."

6. The Commission affirms the determination that there was no record evidence that U S WEST tried to resolve its discovery matter informally before filing the motion to compel. U S WEST's motion relied on ¶ 9 in the Procedural Order, which provides that, "Failure to timely object [to written discovery requests] will be a waiver of objections." U S WEST did not describe any attempts to resolve the matter in its Motion to Compel discovery. U S WEST's attorney presented this information to the Commission in oral argument in prehearing conferences and no transcript was prepared. However, the argument was not included in the written motion and not provided until after the Commission discussed this in a work session prior to the first prehearing conference, and not until after the Commission deferred ruling on the motion. In the initial work session before the first prehearing conference, the Commission did not have the information U S WEST points to in this motion for reconsideration. The Commission was reluctant to compel discovery, possibly irrelevant for any purpose in this Docket, and instead denied the motion pursuant to ¶ 11 in the Procedural Order which permitted the Commission to deny the motion based on a missed deadline in the Procedural Schedule.

7. The Telecommunications Act of 1996 (the Act) provides further support for this decision. Section 252(b)(4)(A) of the Act requires the Commission to limit its arbitration to the issues set forth in the petition and the response. The Commission may require the parties to provide "such information as may be necessary for the State commission to reach a decision on

the unresolved issues." 47 U.S.C. § 252(b)(4)(B). The Commission determined that data responses from AT&T would have provided information that was not necessary for the resolution of the open issues in this arbitration. Much of the information requested related to AT&T's costs, which have not been shown to be relevant in this matter.

8. U S WEST argues in its motion for reconsideration that the information sought could have aided U S WEST in presenting its case and the Commission in making its decision. We disagree. U S WEST's case was well presented and the Commission had sufficient information to decide most of the issues in the matrix. Those few issues not decided due to lack of information are not affected by this discovery ruling.

ARBITRATION DECISION STANDARD (No Reconsideration Requested)

RESOLUTION OF ARBITRATED ISSUES

A. Adopting the AT&T contract.

9. In the Order, the Commission stated, "The record supports a conclusion that one of the contracts must be adopted." Arbitration Order, at 12. The testimony of witnesses for both parties supported adoption of one contract rather than attempting to mesh the two together. The Commission also determined that it was unlikely that the parties would be able to agree on a single contract if the Commission did not choose one format over the other.

10. U S WEST argues that the Commission has no delegated authority under the 1996 Act to decide this issue. The Commission operates under the authority granted by Montana law, not the federal Telecommunications Act of 1996. Although the Commission has a duty to implement federal law as well as Montana law, it does not do so through powers delegated by Congress in the 1996 Act. The Commission has a responsibility to encourage competition in telecommunications, not only with regard to Montana law, but also according to the 1996 federal Act which must be implemented by state commissions. With that duty in mind, we determined that the AT&T contract was more specific and more detailed, and we accepted AT&T's position that it should require less future interpretation. Consistent with our duty to encourage competition, we concluded that AT&T's contract was more complete and pro-competitive.

11. U S WEST argues that the Commission misinterprets both Montana law and the 1996 Act by requiring adoption of AT&T's proposed contract with modifications to reflect the

remainder of the Arbitration Order. It argues that this decision has the effect of imposing hundreds of contractual provisions upon U S WEST for which neither AT&T nor the Commission has provided any supportive reasoning. According to U S WEST, the Commission's procedures and authority remain as defined by state law. It refers to the Montana Administrative Procedure Act (MAPA), stating, "[M]APA requires that contractual provisions be supported by substantial evidence and that the Commission provide a reasoned analysis for every contract term it imposes in this proceeding." U S WEST did not cite a specific MAPA section, but presumably refers to § 2-4-623, MCA, which provides, "Findings of fact shall be based exclusively on the evidence and on matters officially noticed."

12. During the hearing, the Commission took official notice of the AT&T/U S WEST arbitration decisions in the other U S WEST states. We further determined that U S WEST had been given ample opportunity to object to items in the AT&T contract, but also noted that it was not foreclosed on reconsideration or in the approval process from arguing that specific contract provisions should not be included. U S WEST contends that the following particular sections in AT&T's contract are unreasonable:

1) The "pick and choose" provision in § 13.

2) Attachment 2, § 9.12 gives AT&T the right to approve U S WEST filings to terminate or grandfather service offerings prior to submission of those filings to the Commission.

3) Attachment 4, § 4 requires U S WEST to expand and overbuild to accommodate requests for dark fiber or unused transmission medium.

U S WEST asserts that these contract terms will have a substantial impact on U S WEST and requests reconsideration. These were not specifically addressed in the Arbitration Order and we find it appropriate to grant reconsideration for all three.

"Pick and Choose" requirement: This provision has been hotly contested and is presently stayed pending appeal of the FCC's Interconnection Order by the U.S. Court of Appeals for the Eighth Circuit.[1] The 8th Circuit should rule on the "pick and choose" provision soon. There is

[1] See Order Granting Stay, slip op. (8th Cir.) (Oct. 15, 1996), *affecting the FCC's pricing and "pick and choose" rules and not the entire Order in* Iowa Utilities Board, et al. v. FCC, No.

no need to include it in this contract as AT&T will have recourse to it if the court determines that the federal rule can stand. The Commission grants reconsideration on this issue and concludes that this provision should be removed from the contract.

Approval of U S WEST's tariff filings: Attachment 2, § 9.12 provides:

> 9.12.1 U S WEST shall offer for resale to AT&T all obsolete/ grandfathered services. For purposes of this Agreement, an obsolete/grandfathered service is a service that U S WEST offers to existing retail subscribers but not to new subscribers. *AT&T shall have the right to review and approve any U S WEST request for termination of service and/or its grandfathering filed with the Commission*.

13 The Montana Legislature has statutorily delegated the responsibility to the Commission, *inter alia*, to approve U S WEST's tariff filings. The last sentence in § 9.12.1 would permit AT&T to take on this responsibility. Such a contract term should not be approved in an approval proceeding under § 252(e) of the Act. We conclude that the last sentence is not in the public interest and could be discriminatory. The Commission grants reconsideration for this issue and directs the parties to delete the last sentence from § 9.12.1 of Attachment 2. AT&T is not disadvantaged by our decision to strike this sentence because the Commission's present procedures for giving notice of tariff filings provide AT&T with adequate notice of any withdrawal of services proposed by U S WEST.

14 Requests for unused transmission media: Attachment 4, § 4.2.6 provides:

> U S WEST shall be required to expand or overbuild its network and capacity to accommodate requests under this Attachment.

This is a broad, sweeping statement as far as what U S WEST must do to provide transmission media to CLECs. Reconsideration is granted and this section should not be included in the interconnection agreement.

96-3321 (and consolidated cases), appealing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (released Aug. 8, 1996), and see Order Lifting Stay In Part, (8th Cir.) (Nov. 1, 1996), *modifying the stay entered on Oct. 15, 1996, and affecting CMRS and LEC interconnection.*

15 It is also appropriate to reconsider the services that U S WEST lists as not presently offered to end-users in Montana.[2] Unless and until U S WEST offers these services to its own customers in Montana, it need not offer them for resale.

16 U S WEST further argues that there are contract provisions (listed in the motion) for which no record exists to support inclusion in the contract and for which U S WEST and AT&T have stipulated to language different from that in the AT&T contract. Without specific citation and argument from U S WEST, it would be nearly impossible to address the entire list of terms and conditions, except in a general manner as we have done in this Order in the discussion that follows.

17 **U S WEST contends that the AT&T contract does not represent a list of disputed issues submitted for arbitration**. - To support this argument, U S WEST submits that the Commission misquoted § 252(b)(4)(C) of the Act, and that omission of the phrase "as required to implement subsection (c)" is significant because it limits the matters at issue in an arbitration to the requirements of §§ 251 and 252(d) and the establishment of an implementation schedule. The applicable sections of the Act are:

> **Sec. 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.**
> . . . .
> (b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.--
> . . . .
> (4) ACTION BY STATE COMMISSION.--
> (A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).
> . . . .
> (C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties

[2] There are two services listed--Attachment 2, Section 6, Fractional DS1, and Attachment 2, Section 9.16, Hospitality Lines.

> to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.
> (c) STANDARDS FOR ARBITRATION.--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to [the pricing standards in] subsection (d); and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

U S WEST's interpretation is a strained reading of § 252(b)(4)(C), particularly in light of § 252(b)(4)(A), which defines the scope of arbitration issues as "the issues set forth in the petition and in the response, if any." U S WEST's interpretation also ignores § 252(b)(1) which allows any party to the negotiation to petition the Commission to arbitrate "any open issues."

18 Subsection (b)(4)(C) directs the manner by which the Commission must resolve issues raised by the parties but does not limit the scope of the issues that may be raised. The plain language of § 252(b)(4)(C) provides that the issues must be resolved by imposing appropriate conditions as may be necessary to implement the standards for arbitration contained in subsection (c) upon the parties. Subsection (c) contains standards for arbitration which are to be used in arbitrating any open issues and imposing conditions upon the parties to the agreement. The resolution of open issues must be consistent with subsection (c), but subsection (c) does not limit the issues that a state commission may arbitrate.

19 We have interpreted § 252(b)(1) to mean that the Act does not limit the scope of issues that may be raised by the negotiating parties and arbitrated by the Commission. The conscious decision of the non-petitioning party to provide little or no additional evidence in written or oral testimony should not result in a ruling in its favor based on lack of evidence. Such a ruling could result in information being withheld just to prevail on an issue by arguing that there is an incomplete record from which to make a decision. The Act permits the responding party to provide any information "it wishes." U S WEST's decision not to address many of

the individual items in AT&T's contract in hopes that the Commission would adopt either its own contract or no contract at all should not work to its advantage or to the disadvantage of AT&T. It certainly does not have the effect of eliminating the issue from the arbitration.

20 Next, U S WEST argues that the AT&T contract should not be adopted because a portion of § 252(b)(4)(B) of the Act, cited in the Order and relating to the use of the "best evidence available from whatever source derived," was omitted from the citation and overlooked by the Commission. Section 252(b)(4)(B) of the Act provides:

> (B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

The full text of § 252(b)(4)(B) was not overlooked by the Commission. The unresolved issue relating to which contract to use was squarely before the Commission-- AT&T and U S WEST both introduced evidence to support adopting their respective contracts and both parties knew the Commission was struggling with the contract issue.

21 It is disingenuous for U S WEST to argue now, after the Commission has rejected its arguments, that it did not produce information to support its position on many of the contract terms because the Commission did not formally request the information. Both parties have a duty to negotiate agreements in good faith. That duty includes the provision of essential information from which the Commission can make a reasoned decision. More than once the Commission indicated that it considered the choice of a contract a major issue. When the issue was raised by the Commission at the first prehearing conference, both parties assured us that this issue could not be resolved prior to hearing, that both parties would present evidence regarding the issue at the hearing, and that the Commission would have to choose one of the contracts.

22 Section 252(b)(4)(B) of the Act permits the Commission to look outside the evidence in the record if a party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the Commission. The Commission expected to have sufficient

information provided by the parties at the hearing on the issue of which contract should be adopted. The Commission had to decide this issue, as it did other issues, with reference to the information the parties provided. For an issue about which the Commission expected to receive sufficient information at the hearing, as indicated by the parties prior to the hearing, the Commission may proceed on the basis of the best information available to it from whatever source derived. The statute does not require the request to be expressly given to a party. Nonetheless, the Commission must resolve the issues within the nine month period. If sufficient information is not provided by the close of the hearing in an arbitration such as this, the Commission has no adequate means of obtaining additional information from the parties. Congress anticipated such a situation and provided the arbitrator with the means of deciding these issues.

23 Therefore, the Act permits the arbitrator to look to outside-the-record sources if the record is not sufficient to resolve an issue. The Commission determined that the information provided--although it cannot be considered ideal--was adequate to decide the issue without resort to such sources and based its decision on the best information available within the record after concluding that U S WEST could have had no substantial objection to those items not specifically addressed. (This conclusion is discussed more extensively below.)

24 Both parties were aware that the Commission had a very limited time for deciding all issues and that there would be no opportunity for providing further evidence after the close of the hearing. The hearing concluded on February 14, 1997, and the Arbitration decision had to be issued no later than March 20, 1997 to comply with the Act's nine month deadline.

25 The AT&T contract is part of the record, as is U S WEST's contract, and both speak for themselves. The matrix included this issue. The issue was presented for Commission arbitration and the Commission's conclusion concerning the future effect of a more detailed contract which accepts AT&T's assertion that its more detailed contract was drafted to alleviate, to the extent possible, future problems of contract interpretation. The Commission's conclusion that it must choose a contract is fully supported by the record and the Act. We affirm that conclusion on reconsideration.

26 **U S WEST contends there are a number of contract provisions (listed in the motion) for which no record exists to support inclusion in the contract and for which U S**

WEST and AT&T have stipulated to language that is different than in the AT&T contract. - U S WEST includes a list of provisions in the AT&T contract that it claims were not litigated and encourages the Commission to take the necessary time to fully consider its motion, to review its extensive list of contract provisions, and to consider the effects of the adoption of each of those provisions. U S WEST also states that without introducing new evidence it cannot present the appropriate reasons why specific provisions which it claims were not litigated should not be included in the contract. U S WEST further states that the Commission had to ignore the testimony of its witnesses and the cross-examination of AT&T's witnesses in order to conclude that "U S WEST had no substantial objection or significant problem with the portions in AT&T's contract that it did not address."

27 If U S WEST had provided further information and citation, we may have been able to address this request. Comparisons of every term in AT&T's contract that U S WEST listed in its motion with its counterpart in the U S WEST contract (or lack of a counterpart in U S WEST's contract) would be nearly impossible. It is not up to the Commission to hunt through the separate contracts for this information. The parties began their negotiations in June of 1996. The Commission had the petition for arbitration (with copies of both contracts) in late November. While the parties had nine months to review one another's contract, the Commission had barely four months within which to decide all the issues. It is not unreasonable to require the parties to refine their arguments with further precision and particularity.

28 U S WEST generally objects to all provisions of the AT&T contract that were not specifically supported by evidence and explained by the Commission in the Arbitration Order. U S WEST cites an absurd hypothetical example comparing many of the conditions in AT&T's contract to a clause requiring U S WEST to move its corporate headquarters to Fargo, North Dakota. U S WEST certainly would have objected to such a contract term.

29 AT&T identified the contract issue as an open issue in its petition and U S WEST argued that the AT&T contract should not be adopted. The parties identified major disagreements that needed resolution. They provided a matrix and testimony to support their positions. We have provided a process for reconsideration and several contract provisions have been changed to reflect U S WEST's valid arguments on particular contract terms.

30 Further support for the Commission's conclusion is provided by an overview of the terms listed by U S WEST as not litigated. Many of the terms and conditions in U S WEST's exhaustive list of clauses it claims were not litigated are boilerplate terms which are included in most commercial contracts. U S WEST proposed similar provisions in its contract, some which are nearly identical and many providing for similar treatment. It is reasonable to infer that the reason there was no further evidence introduced at the hearing is because there is no substantial disagreement on many of the terms. We again conclude that U S WEST has no substantial disagreement with other terms that it has not specifically identified.

31 Nonetheless, U S WEST believes it should be given the opportunity to present new evidence on those issues if the Commission affirms its position that these provisions should be adopted. We will not open the record at this point to receive evidence that could and should have been provided before the close of the hearing. Such action on our part would only delay the ingress of competition in the local exchange market in Montana and create another obstacle for AT&T and any other competitive local exchange carriers who may intend to use the AT&T model as their own. The parties indicated to the Commission early on in this proceeding the length of time they thought would be necessary. They based their estimate on the number of days taken in other states where arbitration hearings had been concluded. If either party needed additional time for presenting evidence, such a request should have been made within the nine-month period mandated by § 252(b)(4)(C) of the Act, and the Commission would have done whatever possible and reasonable to accommodate the request. The Commission denies reconsideration of the contract issue as requested by U S WEST, except as discussed above.

B. Clarification of the Order.

32 U S WEST's list of objectionable sections and subparts in the AT&T order includes parenthetical notations, some of which indicate that "stipulated language is different." U S WEST states that the attachments also include referrals to DMOQs and other matters which the Arbitration Order addressed and which have to be changed to reflect the Commission's decisions. U S WEST lists the following additional issues which it claims arise because of the adoption of the AT&T contract and which require clarification: (1) stipulated language; (2)

performance standards, business processes and DMOQs; and (3) matters the Commission declined to decide.

33 Stipulated language: Prior to the Commission's Order in this Docket, the parties indicated a number of issues had been resolved and the language had been stipulated for these issues. The Commission considers such issues as having been voluntarily resolved. These issues are not subject to the Arbitration Order nor does the Arbitration Order affect them. The record in this Docket does not contain an exhaustive explanation of issues for which the parties had reached agreement and stipulated to language. During the hearing, one or the other party would indicate that an issue had been resolved or they thought an issue was resolved but were unsure. The result was that the Commission was unsure exactly what had been stipulated on many issues. This is a matter between the parties which must be resolved by them. Only they know what terms and language have been stipulated. The Commission's Arbitration Order does not override stipulated language because the Commission has no authority to arbitrate resolved issues.

34 Performance standards, business processes and DMOQs: U S WEST also requests clarification of the Commission's decision with respect to these items, stating that the statements in the order tend to imply that the Commission is accepting AT&T's DMOQs and liquidated damages provisions. AT&T asserts that there is no need for further clarification as the Arbitration Order is clear. The Order states:

> Given that AT&T's proposed compensation package contemplates the parity standard for quality of service, as an interim solution, the Commission does not approve AT&T's DMOQs. U S WEST must comply with existing service standards. U S WEST shall provide all industry standards currently relied on for provisioning of service for purposes of including them in the parties' interconnection agreement.
>
> The Commission will initiate a generic docket to review and establish permanent minimum quality of service standards and measurements to be applied uniformly throughout the industry.
>
> The Commission also rejects the performance credits during the pendency of the interim standards. If AT&T believes that U S WEST is violating the interim standards, AT&T is not without remedies under the contract or existing law.

Arbitration Decision and Order, at 72-73.

35 U S WEST argues that clarification must be made because DMOQs, penalties, business processes, etc. are strewn throughout the AT&T contract in other places not mentioned in the Order and it should be made clear that those provisions are stricken as well.

36 The Commission's Order accepts liquidated damage provisions, but does not accept the DMOQs and performance credits. Liquidated damages may be included with respect to U S WEST's present standards which the Order approved. The Arbitration Order speaks for itself and does not need clarification on these matters.

37 U S WEST also wants a further clarification of "business processes," to expressly reject the proposed "business processes" advocated in the testimony and exhibits of AT&T's witness, Mr. Finnegan. These were not included in the attachments to the AT&T contract which the Commission rejected. U S WEST states that they are "akin to the DMOQs and other specified processes the Commission has rejected." If this is the case, there is no need to clarify; the Arbitration Order speaks for itself. The Commission stated in the Order:

> No cites to contested sections of the proposed interconnection agreement(s) are provided and neither party defines specific areas of disagreement surrounding the issue. Because it was inadequately developed, the Commission declines to decide this issue and all references in the AT&T contract to such a process shall be deleted.

Arbitration Decision and Order, at 76. To the extent this does not clarify what the Commission decided as to business processes, it remains inappropriate to further clarify this issue as no citations have been provided from which the Commission can examine and make that determination.

38 It is the responsibility of the parties--not the task of the Commission--to make their contract conform to the Arbitration Order. If rejecting Attachment 5, for example, affects other sections of the contract, the parties should make the appropriate changes to reflect the absence of the rejected provisions and the replacement of those provisions as provided in the Arbitration Order. The Commission was not asked to arbitrate each individual section of the contracts and will not get further involved in the details of contract formation.

39 Matters the Commission declined to decide: AT&T's response to U S WEST's motion states that "any disputes regarding whether an issue is settled will have to be determined

based on the record before this Commission." AT&T agrees with U S WEST that the language in the final agreement should not default to the AT&T contract if the Commission declined to decide an issue based on the parties' apparent agreement. However, it argues that unless the Commission expressly recognized this with respect to separate issues in the Arbitration Order, the Commission decided the issue consistent with AT&T's contract.

40 It is appropriate to clarify the Commission's actual intent. If an issue was disputed and the parties later resolved their dispute, the Commission may have declined to decide the issue based on a representation actually made or an inference from the record or the matrix. However, the disputed issue in the matrix often indicated that the contract language was the only item in dispute. There also may be nothing in the record to resolve the issue. The contract language for those matrix issues should not default to the AT&T contract language.

41 Pursuant to U S WEST's request, we list below the arbitration matrix issues submitted to the Commission for resolution that were not addressed in Order No. 5961b. The Commission determined, based on the record, that the parties had either reached agreement on appropriate contract language or had reached an agreement in principle, resolving each of these issues. For the issues which the parties agreed in principle and the Commission was not asked to decide which contract language should apply, the language does not default to the AT&T contract.

Issue	Matrix No.	
Bona fide request procedure	1a	
Two-way trunking	4	
Interconnection with USW end office	5	**(except reciprocal compensation for AT&T switch**)
Distance Limitations for mid-span meets	7	
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C. The decision to initiate a "Generic costing and pricing docket" and the subsequent enactment of Senate Bill 89.

42 Both parties argue that the passage of telecommunications legislation by the 1997 Montana Legislature requires reconsideration of the decision with regard to permanent pricing. The Arbitration Order adopts interim prices, leaving the determination of permanent prices for a separate "generic" proceeding. Senate Bill 89 (SB 89), effective April 22, 1997, imposes requirements on the Commission in conducting arbitrations pursuant to § 252 of the Act. Notably, SB 89 requires the Commission to consider certain factors when setting the wholesale discount and prices for unbundled elements. However, SB 89 also provides an exception from these requirements for an interconnection agreement if the request for arbitration was filed on or before March 1, 1997. Because AT&T's request for arbitration was filed on November 22, 1996, these provisions in SB 89 do not apply to this interconnection agreement.

43 AT&T argues that a decision by the Commission to set permanent prices for unbundled elements in a generic proceeding governed by SB 89 will violate the "hold harmless" provisions of the bill and § 252(c) of the Act, which requires that rates be set according to § 252(d). AT&T states that because SB 89 by its terms applies to any proceeding other than an arbitration under the Act that was filed on or before March 1, 1997, the generic cost docket envisioned by the Commission would be governed by SB 89. AT&T urges the Commission to abandon its plans for a generic cost docket as it applies to AT&T and instead reopen this Docket for the sole purpose of establishing AT&T's permanent rates.

44 U S WEST states that AT&T's most "egregious and misleading claim" is its request that the Commission reopen the record to set permanent rates "solely for AT&T because the legislature somehow intended such a result when SB 89 passed." U S WEST conceded that SB 89 contained a provision that it not apply to certain decisions stemming from arbitrations filed on or before March 1, 1997. However, U S WEST claims that in discussions on the legislation, U S WEST made it clear that the generic cost docket would be subject to SB 89 and would apply to AT&T. U S WEST states it was also clear that the legislature did not intend to exempt AT&T from the provisions of SB 89 in future proceedings. "For AT&T to argue now that the Commission should reopen the record in this proceeding to set permanent rates is yet another attempt by AT&T to backdoor its way out of the valid application of SB 89," according to U S WEST. U S WEST further argues that reopening the record would "contravene the enactment of SB 89" and "would put the Commission squarely in the position of discriminating against all other providers in favor of AT&T." *See* U S WEST's Response to AT&T's Petition for Reconsideration, at 2.

45 Section 17 of SB 89 relates to wholesale pricing standards and § 18 to the pricing of individual network elements. The identical language included in both sections reads as follows:

> This section does not apply to the prices, terms, and conditions of a final or interim arbitrated interconnection agreement, arbitration decision, or appeal from an agreement or decision if the request for arbitration was filed on or before March 1, 1997.

Senate Bill 89, §§ 17(2) and 18(4) (enacted April 22, 1997). U S WEST has not explained what it sees as the purpose for including this exclusion in §§ 17 and 18 of SB 89. To accept its argument would be to disregard the exclusion entirely and proceed with a generic cost proceeding under SB 89 which would also apply to AT&T's permanent rates.

46 Applying basic principles of statutory construction, as a court would do to give effect to the intent of the legislature, we conclude that the provision must apply to permanent prices developed for AT&T during the term of this interconnection agreement. According to rules of statutory construction, statutory language must be construed according to its plain meaning. The plain wording of a statute is often determinative of legislative intent without

further analysis. "If the language is clear and unambiguous, no further interpretation is required." Lovell v. State Fund, 260 Mont. 279, 285, 860 P.2d 95 (1993), citing GBN, Inc. v. Montana Dep't of Revenue, 249 Mont. 261, 265, 815 P.2d 595, 597. The courts will not look to the legislative history of a statute unless the intent cannot be determined from its plain wording. Id.

47 Another rule of statutory construction is that individual sections of an act must be interpreted in such a manner as to harmonize with other sections and so as not to defeat its evident object or purpose. Howell v. State, 263 Mont. 275, 286-87, 868 P.2d 568 (1994). The plain wording of §§ 17(2) and 18(4), when considered with the other parts of the legislation, could not be clearer. Therefore, the legislative intent is set forth in the language of these statutes and further analysis of legislative intent is not necessary. The provision clearly states that other subsections of §§ 17 and 18 do not apply to an arbitrated interconnection agreement if the request for arbitration was filed on or before March 1, 1997. Because AT&T's petition for arbitration was filed before that date, §§ 17 and 18 do not apply to terms in this interconnection agreement.

48 Section 1-2-101, MCA, provides additional support for this conclusion. It provides that, where there are several provisions, a construction is to be adopted that will give effect to all. We are unaware of any interconnection agreement other than this agreement between U S WEST and AT&T to which the provisions could apply.[3] Were we to adopt U S WEST's interpretation, §§ 17(2) and 18(4) would have no meaning or effect. The legislature does not perform useless acts and thus an interpretation that gives effect is always preferable to an interpretation that would invalidate a statute or treat it as mere surplusage. American Linen Supply Co. v. Montana Dep't of Revenue, 189 Mont. 542, 545, 617 P.2d 131 (1980). *See also* §§ 1-3-228 and -232, MCA (maxims of jurisprudence).

49 The "generic" docket that was envisioned at the time the Arbitration Order was issued would have determined permanent rates for AT&T and would also have applied to other competitive local exchange carriers (CLECs). There is no urgent reason as far as this proceeding

[3] The latest possible request for negotiation which may be controlled by §§ 17(2) and 18(4) would have to have been received March 1, 1997. A written request received by a LEC on that date would permit a party to request arbitration by the Commission between July 14 and August 8, 1997.

is concerned to develop generic costs and prices according to the dictates of SB 89. There is still a need, however, to develop permanent prices for AT&T. Rather than a "generic" docket, the Commission will initiate an "omnibus" docket from which permanent rates for this arbitration proceeding will initially ensue. The Commission can then use the record developed in determining AT&T's prices for further determination of rates according to the dictates of SB 89, if necessary.

50 As a final argument on this issue, U S WEST perfunctorily stated that determining separate rates to apply to AT&T would be discriminatory. We disagree. The Act permits other CLECs to adopt the AT&T contract if they wish. *See* 47 U.S.C. § 252(i). When the term for this AT&T/U S WEST agreement expires, AT&T's rates will be determined according to the new law. Until then, the exception applies.

SPECIFIC FINDINGS AND CONCLUSIONS ON MATRIX ISSUES

A. Interconnection and Collocation (Issues 1-13)

1. Types of Collocation and Collocated Equipment

a. Issue 6 - Types of Collocation (No Reconsideration Requested)

b. Issue 9 - Types of Collocated Equipment

51 U S WEST requests the Commission reconsider its decision to allow AT&T to collocate remote switching modules (RSMs) on U S WEST's premises. U S WEST claims that RSMs are not necessary for interconnection. U S WEST further claims that the Commission's decision is inconsistent with the Act and results in a confiscatory taking.

52 U S WEST argues that the Act only requires incumbent local exchange carriers (ILECs) to allow physical collocation of equipment necessary for interconnection or access to unbundled elements. This argument revolves around the FCC's interpretation of the term "necessary" in ¶¶ 578-581 of its Interconnection Order. The Commission adequately addressed this issue at pages 19-21 in the Arbitration Order, concluding that the FCC's interpretation controlled resolution of this issue. For this and other issues which we believe are adequately addressed in the Arbitration Order and for which reconsideration requests are based on disagreement with unstayed portions of the FCC Interconnection Order, there is no need for further discussion.

53 At a minimum, however, U S WEST contends that, although the Commission has prohibited AT&T from using RSMs to bypass access charges, U S WEST cannot police such a restriction. U S WEST requests that the Commission require AT&T to disable the switching function in collocated RSMs. Even though AT&T has agreed not to use RSMs to bypass U S WEST access charges, we considered this agreement to be a necessary condition for collocating RSMs. We required the parties to include a contract term stating that RSMs may not be used to bypass access charges. If it believes that AT&T has violated this contract term, U S WEST can take appropriate action.

54 We decline to address U S WEST's brief reference to a confiscatory taking. There can be no determination of such without full consideration in a rate proceeding.

2. Premises at Which U S WEST will Permit Collocation.

a. Issue 1 and Issue 3 - Points of Interconnection (No Reconsideration Requested)

b. Issue 1a - Bona Fide Request (No Reconsideration Requested)

c. Issue 2 - Ordering process (No Reconsideration Requested)

d. Issue 3a - Backhaul

55 U S WEST requests reconsideration of the Commission decision which permits AT&T to choose interconnection points. U S WEST's position on this issue is contrary to the Act. We deny reconsideration on this issue because it has been adequately addressed and appropriately decided. *See* Arbitration Decision and Order, at 23-24.

e. Issue 4 - Two-way Trunking (Resolved by the parties) (No Reconsideration Requested)

f. Issue 5 - Interconnection with U S WEST's End Offices (Reciprocal Compensation) (No Reconsideration Requested)

g. Issue 7 and 8 - Distance Limitations for Mid-Span Meets and Meet Points for Access to Unbundled Network Elements

56 U S WEST raises two concerns about the Commission's resolution of this issue. First, U S WEST maintains it should not be required to extend its facilities more than one-half

the distance between the parties' switches. Second, U S WEST suggests that the Commission clarify that AT&T should pay the costs of constructing meet points up front.

57 AT&T questions U S WEST's reconsideration request on this issue because the Commission generally adopted U S WEST's contract provision on mid-span meet points.

58 The Commission denies U S WEST's request to limit the distance it would be required to extend to meet points. As clarification, if the meet point arrangement is for traffic exchange between AT&T and U S WEST, each party is responsible for constructing its own facilities up to the meet point, but no farther than one-half the distance between the parties' central offices.

59 The Commission ruled that AT&T is responsible for the full cost of meet point arrangements that it will use to access an unbundled network element. We deny reconsideration of U S WEST's request that AT&T be required to pay these costs up front because no citation to the record has been provided to indicate that the Commission was asked to decide this issue.

h. Issue 10 - Collocation Premises

60 U S WEST requests Commission reconsideration of its decision with respect to premises in which U S WEST must permit AT&T to collocate its equipment. U S WEST's primary concern is the Commission's rejection of the bona fide request (BFR) process for collocation requests. U S WEST explains that while the Commission did not adopt the BFR process, it also did not provide any guidance to U S WEST on what the appropriate process should be.

61 AT&T responds that the Commission's direction is clear regarding the standard ordering processes to be used, and that all that remains is for the parties to follow those directions.

62 From the parties' arguments on this issue, we believe there may be misunderstanding by both parties regarding the Commission's direction. Although we did not adopt U S WEST's proposal that the BFR process be used for collocation requests, we also did not direct the parties to develop a standard ordering process for collocation as suggested by AT&T. *See* Arbitration Decision and Order, at 27 (discussion of Issue 12).

63 U S WEST's proposed ordering procedure for collocation is described generally throughout § 7 of its proposed contract. The Commission generally adopted the collocation ordering process from U S WEST's proposed contract, including the "Collocation Installation Intervals" in § 7.5. The Commission also adopted U S WEST's proposed collocation rates on an interim basis, including U S WEST's proposed "Quote Preparation Fee" of $2,188.71. *See* Arbitration Decision and Order, at 87 (discussing Issues 67, 70, and 71).

64 The Commission denies U S WEST's request for reconsideration, although it is unclear why the request was made because the Commission generally adopted U S WEST's position.

i. Issue 10a - Collocation General Terms.

65 U S WEST presents three issues related to the Commission's decision on collocation general terms. First, U S WEST restates its position that it should only be required to provide for fiber optic entrance cables, arguing that if all CLECs are allowed to use copper, its entrance facilities will be prematurely exhausted. Second, U S WEST argues that it should not be required to store AT&T's maintenance spares because it is not a necessary form of collocation.

66 In the Arbitration Order, the Commission placed no restrictions on the type of cable AT&T may use for entry into collocated space and also declined to order U S WEST to provide storage space to AT&T without compensation. Arbitration Decision and Order, at 26. U S WEST's motion restates previous arguments. The Commission's decisions are adequately discussed in the Order and reconsideration of these general terms of collocation is denied.

67 Finally, U S WEST states that it is unclear from the Commission's Order whether the Commission is adopting the liquidated damages "strewn throughout the AT&T contract," or if the penalty provisions were rejected. The Arbitration Order clearly allows liquidated damages to be included in the final reconstructed AT&T contract.

j. Issue 11 - Interconnection with Other Collocators (resolved by the parties) (No Reconsideration Requested)

3. Standard Ordering Processes (No Reconsideration Requested)

a. Issue 12 - Ordering Procedure for Collocation (No Reconsideration Requested)

b. Issue 13 - Collocation Space (No Reconsideration Requested)

B. Extent of Unbundling (Issues 14-26, 68)

1. Issue No. 14 - General Extent of Unbundling (No Reconsideration Requested)

2. Issue 15 and Issue 68 - Local Loop: Definition and Charge for Loop Conditioning.

a. Definition (No Reconsideration Requested)

b. Charge for Loop Conditioning

68 Both AT&T and U S WEST request reconsideration of the Commission's decision imposing a $110.00 charge for loop conditioning. AT&T asserts that the loop conditioning charge approved by the Commission is not supported by the record in this docket, citing its testimony that loaded loops would not be efficient engineering in a forward looking environment. According to AT&T, there should be no charge.

69 U S WEST argues that the $110.00 charge imposed by the Commission for loop conditioning is inadequate. U S WEST further alleges that the Commission's finding that U S WEST's proposed loop conditioning charge of $577.48 is excessive is not supported by the record.

70 Neither party presented new arguments on the issue. We deny reconsideration on this issue as the Commission's discussion adequately addresses the parties concerns raised on reconsideration. *See* Arbitration Decision and Order, at 29-30.

71 U S WEST requests that the Commission allow a true-up mechanism on these charges if the permanent price is determined to be higher than the interim price. U S WEST does not suggest a reciprocal true-up in favor of AT&T if the permanent price is lower than $110.00. In keeping with the majority of decisions in this arbitration, we decline to require a true-up for non-recurring loop conditioning charges.

3. Issue 16 - Subloop Unbundling (No Reconsideration Requested)

4. Issue 17 - NID Connections (No Reconsideration Requested)

5. Issue 18 - Vertical Features

72 U S WEST believes the Commission should reconsider its decision to include vertical switching features as part of the unbundled switching element. As set forth in the Arbitration Order, the FCC has ruled that the features are part of the switching element. The Commission decision was appropriately decided according to FCC rules. *See* Arbitration Order, at 31-32. We deny U S WEST's request for reconsideration.

6. Issue 19, Issue 20, and Issue 21 - Advance Intelligent Network (AIN) Triggers, Digital Cross-connect, and Packet Switching (No Reconsideration Requested)

7. Issue 22 - Dark Fiber

73 U S WEST has raised no new arguments to support reconsideration of this issue. The Commission thoroughly reviewed U S WEST's arguments and concluded that dark fiber should be unbundled as a separate element. That conclusion is well supported in the Arbitration Order. Arbitration Order, at 32-34. We deny U S WEST's request for reconsideration of this issue.

8. Issue 23 and Issue 24 - Service Control Point (SCP) Unbundling and Interconnection With Other Networks (No Reconsideration Requested)

9. Issue 25 - PLATFORM (unbundling and recombination of network elements)

74 Geographic Deaveraging - AT&T claims that the Commission "failed to discuss deaveraging and rejected AT&T's recommendation to deaverage rates." AT&T's only new argument in support of deaveraging rates is its reference to Docket No. D96.12.220 in which U S WEST has not filed to deaverage retail rates. Because U S WEST has failed to file deaveraged rates in the rate rebalancing case, AT&T opines that the Commission should order U S WEST to file deaveraged retail rates. The Commission stated:

> [W]e will not deaverage rates for unbundled network elements at this time. The FCC's geographic deaveraging requirements have been stayed by the 8th Circuit and we need not follow them. Moreover, the record is deficient on the policy and market impacts of deaveraging. Geographic deaveraging of network elements should be included as an issue in the generic U S WEST costing and pricing proceeding.

Arbitration Order, at 83.

75 This is not the proper docket in which to address AT&T's request that U S WEST be required to file deaveraged rates. The reference in the quoted paragraph and all others in the Arbitration Order to the "generic costing and pricing proceeding" is superseded by the Commission's decision herein to initiate an omnibus proceeding. Reconsideration is denied.

a. Unbundling and Recombination (No Reconsideration Requested)

b. Rebundling Charge

76 AT&T argues that the Commission should reconsider its decision imposing a rebundling charge when AT&T combines network elements to replicate an existing U S WEST service. AT&T presents no new arguments against imposition of the rebundling charge. The Commission's thorough discussion of the rebundling charge adequately addresses AT&T's argument and appropriately decides the issue. *See* Arbitration Decision and Order, at 36-38. Reconsideration of this issue is denied.

10. Issue 26 - Customized Routing (No Reconsideration Requested)

C. Resale (Issues 27-36, 54)

1. Issue 27 - Services to be Made Available for Resale

77 The Arbitration Order requires U S WEST to offer all retail services it provides to end user customers to AT&T for resale at wholesale prices. It specified that these services include regulated, unregulated, tariffed, detariffed, basic and enhanced services, including information services. U S WEST questions three of the Commission's decisions concerning this requirement.

78 First, U S WEST argues that the Commission should not require further discounts to resellers on services already offered at volume discounts. U S WEST states that the prices for volume discounted services already reflect the avoidance of many of the usual costs of selling the services at retail. Second, although U S WEST agrees that residential services should be resold, it argues that no discount should apply because the retail price for this service is already below cost. Last, U S WEST argues that information services including enhanced services such as voice messaging, enhanced fax, and conferencing services are excluded from the definition of telecommunications services and are therefore excluded from the resale requirements in the Act.

79 The Commission concluded that U S WEST must resell all services it offers at retail to end users who are not telecommunications carriers, including telecommunications services and information services, stating that information services and telecommunications services are not mutually exclusive. In its response, AT&T urges the Commission to adhere to its decisions on these issues. AT&T believes the Commission's decision regarding the resale of information services was sound. AT&T also argues that the Commission's decisions requiring U S WEST to offer all services at a discount were correct and firmly grounded in the Act.

80. Theoretically, some of U S WEST's services that include volume or term discounts, or discounts for "packaged" services should possibly receive a lower wholesale discount when sold to resellers. The record does not include sufficient information to make that determination, however. The Commission adopted a single wholesale discount rate for all services which applies to U S WEST's "already discounted" services. These discounted services may not be the only categories of services where different percentages of costs should be considered. Individual percentages must be determined in a subsequent avoided cost proceeding. The Commission's decisions on "already discounted" services and residential services are adequately addressed in the Arbitration Order and need no further clarification. Our decision concerning information services is clarified and expanded upon below.

81. We have reviewed the references cited by U S WEST to support its argument that information services are not telecommunications services. The FCC does in fact generally treat information services and telecommunications services as mutually exclusive. The FCC concluded that all services it previously considered to be "enhanced services" are "information services." In the Matter of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, ¶ 102, CC Docket No. 96-149 (Dec. 24, 1996). The FCC further concluded that telemessaging is an information service. Id., at ¶ 145. Some information services that are covered by the FCC's definition of information services are used to facilitate the provision of a basic telecommunications transmission service, without altering the character of that service, and are treated as "telecommunications services," however. Id., at ¶¶ 107 and 123. The FCC's treatment of information services and telecommunications services is key to the

ability of RBOCs to offer incidental interLATA services and their prohibition from offering in-region interLATA services, generally, until they have met the conditions of § 271(c)(2)(B) of the Act.

82. The FCC's conclusions in the Non-Accounting Safeguards Order do not control our interpretation of telecommunication services that must be offered for resale. Some services that are classified by the FCC as "information services" and therefore not "telecommunications services" fall within the ambit of Montana's definition of "regulated telecommunications services." *See* § 69-3-803(3), MCA. Voice messaging service is an example. We conclude that any telecommunications service that falls under either the state or federal definition of telecommunications services is subject to resale. Therefore, even though VoiceMail may not be classified by the FCC as a telecommunications service, it meets the Montana statutory definition of "regulated telecommunications service" which does not distinguish telecommunications services and information services, and must be offered by U S WEST at a wholesale discount to resellers.

2. Issue 27a - Features and Functions (No Reconsideration Requested)

3. Issue 28 - Time Frame for Distinguishing Promotions from Retail Offerings (No Reconsideration Requested)

4. Issue 29 - Resale Restrictions

83. AT&T contends that the Commission's language in the Arbitration Order potentially imposes broader resale restrictions than those requested by U S WEST and claims that U S WEST requested only two restrictions: (1) residential service may only be resold to residential customers, and (2) lifeline-type services should only be resold to eligible end-users. AT&T requests that the Commission revise the Arbitration Order to be consistent with U S WEST witness Cheryl Gillespie's response to a question during the hearing. The wording in the Arbitration Order is consistent with Ms. Gillespie's direct prefiled testimony and with U S WEST's position as described in the February 17 "Matrix of Disputed Issues." U S WEST Exhibit 26, at 56. U S WEST argued that the Commission should determine that a telecommunications service should be resold only for its intended or disclosed use, under the same terms and conditions applicable to U S WEST end users, and only to the same class of customers that are

eligible to purchase the service from U S WEST. We deny reconsideration of this decision as it is adequately addressed in the Arbitration Order and fully supported by the record.

5. Issue 30 and Issue 54 - Branding

84. AT&T states that the Commission's resolution of this issue does not reflect the extent of the parties' agreements on rebranding and does not fully or adequately address remaining issues. Initially, we point out that in resolving issues by arbitration, the Commission is not required to incorporate a thorough discussion of the parties' voluntarily agreements on any issue and, in fact, the Commission does not necessarily possess this information and will not have it until a final agreement is filed for Commission approval pursuant to § 252(c) of the Act. AT&T's discussion, however, appears actually to question only a branding issue related to operator services/directory assistance (OS/DA) calls.

85. AT&T is concerned that under U S WEST's proposal--which the Commission adopted with some modification[4]--in certain circumstances AT&T's customers may be exposed to U S WEST's branded OS/DA. U S WEST has agreed to rebrand OS/DA calls with AT&T's branding when technically feasible, but AT&T argues that when U S WEST does not rebrand OS/DA calls, it should at least unbrand the calls to avoid any customer confusion that could arise from an AT&T customer hearing U S WEST's branding.

86. We deny reconsideration on this issue. As the Commission noted in the Arbitration Order, U S WEST agrees to either rebrand or unbrand directory and operator services where technically feasible.[5] We emphasize, however, that U S WEST will be expected to provide adequate evidence to support any claim that rebranding or unbranding OS/DA is technically infeasible, as required by FCC rule. *See* 47 C.F.R. § 51.613(c). Failure to do so will be construed as an unreasonable restriction on resale in violation of § 51.613(c).

6. Issue 31 - Wholesale Pricing--Factors to Consider

a. Factors to consider in wholesale pricing (No Reconsideration Requested)

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[4] *See* Arbitration Decision and Order, at 42-43.

[5] *See* U S WEST's position on Matrix Issue No. 30.

i. AT&T's Model (No Reconsideration Requested)

ii. U S WEST's Avoided Cost Models (No Reconsideration Requested)

iii. MCC's Wholesale Discount Proposal (No Reconsideration Requested)

b. Arbitrated Resolution

87. **Avoided Cost Model** - In the motion for reconsideration AT&T states that the Commission fails to explain the basis for its decision to modify the following inputs to AT&T's avoided cost model: (1) Unseparated Revenues, (2) Capital Cost and Other Taxes, (3) Rate of Return and Taxes and Access and Miscellaneous Costs, and (4) Percentage of Costs Avoided. The Commission discussed both parties' avoided cost models and the resolution of the issue, including adjustments that were made to AT&T's model, at pages 43-49 of the Arbitration Order. AT&T's request for additional explanation is reasonable, however, and a further clarification of perceived deficiencies in this cost model will aid the parties in developing their presentations to the Commission in the future proceeding on costing and pricing issues.

88. **Clarification and further explanation of adjustments to AT&T's avoided cost Model** - To have proper matching of costs and revenues, data must relate to the same services. The Commission considered it appropriate to use the unseparated revenues from the ARMIS 43-03 report in determining the wholesale discount because the verifiable expenses in AT&T's model are unseparated. We did not accept AT&T's claim that its model properly matches intrastate retail revenues to intrastate retail costs.

89. AT&T made an adjustment to the unseparated expenses in the ARMIS 43-03 report to match intrastate revenues and costs. AT&T adjusted unseparated expenses using results from a Bell Atlantic study to calculate the portion of costs included in the unseparated expenses in U S WEST's ARMIS report that are attributable to providing other than retail service. There was no showing on the record that applying the Bell Atlantic study results to U S WEST's Montana operations was valid.

90. The Commission found that U S WEST CAAS data would have provided AT&T with the information necessary to verify the validity of the Bell Atlantic study or, alternatively,

would have allowed AT&T to develop a more accurate adjustment to incorporate into the study. AT&T did request and obtain CAAS data from U S WEST for purposes of verifying the validity of the Bell Atlantic study's application or making another adjustment. However, AT&T argued the CAAS data were not provided in a timely manner and, therefore, AT&T was precluded from verifying the study's application or making another adjustment.

91. The parties disputed the timely provision of U S WEST's CAAS data throughout this proceeding, but further reference to that problem is irrelevant here. It is sufficient that there was no verification of the applicability of the Bell Atlantic study to U S WEST's Montana operations. Without the Bell Atlantic study cost adjustment, the Commission is left with unseparated expenses for purposes of determining a wholesale discount. Having only unseparated expenses with which to determine the discount the Commission, under matching principles, must use unseparated revenues to calculate the discount.

92. AT&T questions the Commission adjustment adopting U S WEST's approach to "capital costs" and "other state and local taxes." The Commission's adoption of U S WEST's approach to these two items is simple. There was no line item of expense for "other state and local taxes" in AT&T's avoided cost model and the Commission adopted the U S WEST cost of capital because it reflected the stipulated overall rate of return for Montana.

93. AT&T requests an identification of the accounts in the avoided cost model where the Commission disagreed with AT&T's assumptions regarding the percentage of costs that U S WEST would avoid. AT&T assumed that U S WEST would avoid 100 percent of the expenses in the "Product Management" and "Customer Services" accounts. We do not concur with this assumption because U S WEST made a reasonable showing that the costs in these accounts would not be entirely avoided. *See* U S WEST Exhibit No. 4. Although U S WEST made a reasonable showing that it would not avoid 100 percent of these costs, it failed to provide sufficient information for the Commission to determine a specific percentage of costs that would be avoided.

94. In order to determine a reasonable avoided cost percentage without this showing, we referred to and took direction from the FCC's Interconnection Order. The FCC determined that "it is reasonable to assume, for purposes of determining a default range of wholesale

discount rates, that ten percent of costs in accounts 6611, 6612, 6613 and 6623 are not avoided by selling services at wholesale."[6] First Report and Order, at ¶ 928.

95. U S WEST's motion for reconsideration requests service specific discount rates as proposed by U S WEST and a Commission clarification that the discount rate determined in the Arbitration Order is interim only. The Commission fully explained the reasons for not accepting U S WEST's proposed service specific discount rates in the Arbitration Order and will not burden this order by reiterating them. U S WEST's request that the Commission make a specific finding that the discount rate determined in Order No. 5961b is interim is granted. The wholesale discount rate ordered in Order No. 5961b shall remain in effect only until the Commission completes a cost/pricing proceeding establishing a permanent rate.

7. Issue 32 - Packages Available for Resale (No Reconsideration Requested)

8. Issue 33 - Resale of "below-cost" Services (No Reconsideration Requested)

9. Issue 34 - Service quality Credits (*see* Issues 63 and 64) (No Reconsideration Requested)

10. Issue 35 - Deposits (No Reconsideration Requested)

11. Miscellaneous Resale Issues

a. Issue - Customer Transfer Charge

96. Both parties request reconsideration of the Commission's finding that a $5.00 customer transfer charge was reasonable. The parties have merely restated their previous arguments on this issue. We deny reconsideration as this issue was adequately addressed in the Order and appropriately decided. Arbitration Decision and Order, at 52-53.

b. Issue 36 - Construction and Additional Charges

97. The Arbitration Order requires AT&T, as a reseller of U S WEST's services, to pay undiscounted construction costs that U S WEST incurs to service an AT&T customer. AT&T's charges and method of payment will be consistent with the manner in which the customer would be charged as a U S WEST customer. In its Motion for Reconsideration, U S

[6] Account 6611- product management, Account 6623 - customer services.

WEST argues that the Commission should require AT&T to fund construction up front when it requests U S WEST to construct facilities on its behalf. U S WEST contends that this decision requires it to subsidize the entry of its competitors.

98. AT&T responds that U S WEST's proposed approach, which treats U S WEST's own end users differently from resellers, constitutes discrimination in violation of the Act and, further, that such a policy would erect a barrier to entry, also violating the Act.

99. We deny reconsideration of this issue. To the extent that U S WEST's request refers to its reimbursement of construction costs that are not reflected in U S WEST's retail tariff, if these issues are not already resolved between the parties or by the Arbitration Order, the parties should negotiate the terms and arrangements necessary.

D. Electronic Interfaces and Operational Support Systems (OSSs) (Issues 38, 39, 40, 41, 43, 43a, 44, 75, 81)

100. AT&T repeats its request that the Commission order U S WEST to adopt Electronic Data Interface (EDI) for ordering and Electronic Bonding-Trouble Administration (EBTA) for maintenance and repair because these interfaces already exist and have the potential to become the long term solution for OSS. We deny reconsideration of this matter. The Commission adequately addressed these issues in the Arbitration Order. Arbitration Decision and Order, at 54-57.

E. Local Number Portability (Issues 45-47)

F. Access Issues (Issues 48a, 48b, 49-54, 56)

1. Issue 48a - Scope of Access (*see* Issue 50) (No Reconsideration Requested)

2. Issue 48b - Reciprocity (No Reconsideration Requested)

3. Issue 49 - Space Reservation

101. U S WEST asks for reconsideration of the Commission's decision to adopt AT&T's contract language with respect to space reservation. It argues that it should be able to reserve its own space for maintenance and administrative purposes and should not be required to make that space available to AT&T.

102. As described in the Arbitration Order, the Commission reviewed AT&T's relevant contract language and concluded it was generally consistent with language in the FCC's

Interconnection Order. AT&T's contract language was adopted in the Arbitration Order, in which we also noted that the parties indicated they had resolved this issue, but the Matrix did not show that the issue had been resolved.[7] The Arbitration Order also concluded that U S WEST may not reserve any more capacity than is necessary for maintenance purposes and may not reclaim any such reserved capacity for its own use to the detriment of CLECs. This issue was adequately addressed and appropriately decided in the Arbitration Order, and needs no further clarification. *See* Arbitration Decision and Order, at 58-60.

4. Issue 50 and Issue 48a - Modification of Facilities and Scope of Access (No Reconsideration Requested)

5. Issue 51 - Licenses for Restricted Rights of Way

103. U S WEST argues that our resolution of this issue means, without its consent, it will be forced to act as AT&T's agent in order to make arrangements with the grantor or licensor of the right of way for AT&T to gain access. U S WEST states there is nothing in the record or in the Commission's decision that indicates U S WEST is required under Montana law to exercise its eminent domain powers for the benefit of another provider.

104. The reference to Montana law is irrelevant. As we stated in the Arbitration Order, the FCC Interconnection Order places a duty on the incumbent, U S WEST, to "take reasonable steps to exercise eminent domain powers to expand existing rights of way over private property for the benefit of AT&T." Arbitration Decision and Order, at 61. The Order adopts the AT&T contract language because it is consistent with the FCC's requirement. This issue was adequately addressed and appropriately decided. *See* Id.

6. Issue 52 - Dialing parity for Local Calls (resolved by the parties) (No Reconsideration Requested)

7. Issue 53 - Operator Services and Directory Assistance (No Reconsideration Requested)

8. Issue 54 - (*see* Issue 30; Branding) (No Reconsideration Requested)

[7] The Commission stated in the Order that it was unable to find a section in U S WEST's contract that addressed this issue. Arbitration Decision and Order, at 59.

9. Issue 56 and Issue 57 - Call Completion Services and Access to Directory Assistance Database (No Reconsideration Requested)

10. Issue 57 - Access to Directory Assistance Database (No Reconsideration Requested)

G. Access to Number Resources (Issues 58, 62, and 77)

1. Issue 58 - Busy Line Verification/Busy Line Interrupt

105. AT&T's motion states that because both parties have resolved this issue, the Commission should order the parties to use their agreed upon language.

106. In the Arbitration Order, the Commission recognized that the parties had resolved this issue, but stated that, to the extent the parties had not reached agreement on contract language prior to Commission resolution, the language from U S WEST's contract should be adopted because it appeared to be reasonable and is clearer and more comprehensive than AT&T's referenced terms. Our decision to adopt the more comprehensive contract language is consistent with our decision to adopt AT&T's more comprehensive and detailed contract for the reasons stated in the Arbitration Order and above.

107. AT&T argues that two issues arise from the Order: 1) it is ambiguous regarding the meaning of "Commission's resolution;" and 2) if the parties have reached agreement, the Order should direct the parties to incorporate their agreement in the contract. First, "Commission resolution" means the resolution of unresolved issues in the Arbitration Order. On the second point, the discussion in this Order clarifies our interpretation that a mutual agreement on contract terms removes an issue from Commission jurisdiction.

2. Issue 62 and Issue 77 - E-911 and E911/911 (No Reconsideration Requested)

H. Ancillary Services and Branding (Issues 53, 55, 60-62, 67-69, 76)

1. Issue 53 - Operator Services and Directory Assistance Unbundling (No Reconsideration Requested)

2. Issue 55 - Trunking (No Reconsideration Requested)

3. Issue 60, Issue 61 and Issue 76 - Listings, Directories and Yellow Page Advertising

108. U S WEST asked for reconsideration of matters concerning directory publishing, distribution, and recycling. AT&T states that U S WEST does not directly take issue with the Commission's rationale, which is firmly grounded on principles opposing discrimination and barriers to entry. U S WEST's motion restates the arguments already addressed by the Commission at length in the Arbitration Order and does not address the specific Montana administrative rules which form the basis for some of the decisions in the Order. *See* Arbitration Decision and Order, at 64-69. We deny reconsideration of this issue as it was adequately addressed and appropriately decided.

109. If the Commission does not grant reconsideration regarding these decisions, U S WEST requests that the Commission clarify U S WEST's obligations as compared to U S WEST Dex's obligations. As stated by U S WEST, U S WEST DEX publishes directories on behalf of U S WEST Communications, Inc. *See* U S WEST's Motion for Reconsideration, at 38. We decline to further expand the issue because to do so this would go beyond what the Commission was asked to resolve in this arbitration.

a. White and Yellow Page Listings (No Reconsideration Requested)

b. Call Guide Pages (No Reconsideration Requested)

c. AT&T Information on Directory Cover (No Reconsideration Requested)

d. Director Recycling (No Reconsideration Requested)

e. Directory Distribution (No Reconsideration Requested)

f. Paid Yellow Page Advertising (No Reconsideration Requested)

g. Sale of Listings - Compensation (No Reconsideration Requested)

h. Listings for Interim Number Portability (No Reconsideration Requested)

4. Issue 62 and Issue 77 - E911 and E911/911 Call Routing (No Reconsideration Requested)

5. Issue 67 - Costs U S WEST May Recover (*see* Section K) (No Reconsideration Requested)

6. Issue 68 - Charge for Loop Conditioning (*see* Section B, Issue 15) (No Reconsideration Requested)

7. Issue 69 - Bill and Keep

110. AT&T requests that the Commission reverse its decision not to adopt bill and keep for cost recovery associated with call termination and transport. AT&T alleges that the record does not demonstrate that U S WEST can accurately measure terminating traffic; therefore, the Commission should adopt bill and keep until such time as U S WEST demonstrates that ability.

111. The Arbitration Order clearly addresses AT&T concerns. If U S WEST cannot measure traffic or conduct adequate studies to measure terminating traffic, bill and keep will be used. We deny reconsideration; the Arbitration Order adequately addressed this issue and was appropriately decided.

112. Further, AT&T is asking that the Commission determine that AT&T be compensated at the tandem switch rate because any switch that it would use would serve the same geographic area served by U S WEST's tandem and comparable geographic coverage is the criterion determined appropriate by the FCC to select switch compensation rates. The Commission declined to decide whether AT&T's switch should be treated as an end office or a tandem switch for compensation purposes because the record was inadequate to make such determination.

113. In a previous arbitration decision, the Commission determined that geographic coverage was not the sole criteria to be used when determining reciprocal compensation and concluded that switch functionality should also be considered. That order provides in pertinent part:

> 25. The Commission concludes that call termination on Western's network should be priced at U S WEST's end-office termination prices. This conclusion is based on testimony in the record which suggests that Western's switch, although capable of performing the same functions as a tandem switch, in fact does not function as such.

In the Matter of Western Wireless Corporation's Petition for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996, of the Rates, Terms, and Conditions of Interconnection

with U S WEST Communications, Inc., Docket No. D96.9.150, Order No. 5949b, at 14 (Dec. 27, 1996). The Commission's finding in the Arbitration Order--that AT&T provided insufficient information--is consistent with the Western Wireless decision that actual switch functions must be considered as well as geographic area in order to determine appropriate switch compensation. *See* Arbitration Decision and Order, at 69-70. We deny reconsideration on this issue.

I. Service Quality (Issues 34, 43, 63, 64)/Business Processes (Issues 37a, 37b, 56, 59-62, 72-77, 80, 82)

1. Issue 34, Issue 63 and Issue 64 - Service Quality Credits, Quality Standards and Performance Credits

114. AT&T again requests that the Commission adopt the Direct Measures of Quality (DMOQs) from its contract. The Commission's discussion of this issue adequately addresses the reasons for rejecting AT&T's DMOQs. *See* Arbitration Decision and Order, at 70-73. AT&T's petition for reconsideration includes copies of orders evincing the difficulty experienced in two other states concerning U S WEST service standards. We are aware there have been problems implementing quality standards in Colorado and Iowa because U S WEST has not provided standards as contemplated by the respective commissions. As previously ordered, U S WEST must provide information to AT&T so that its internal standards may be incorporated into the agreement.

115. The following statement indicates that U S WEST may have misinterpreted our Arbitration Order in this regard:

> AT&T argues that the Commission should impose service quality standards and penalties. The Commission appropriately rejected the ... standards proposed by AT&T. The Commission has in place existing service quality standards which apply to U S WEST. If further requirements are needed, the Commission can begin a generic service quality docket in order to appropriately develop those standards for the whole industry in Montana.

U S WEST's Response to AT&T's Petition for Reconsideration, at 8. The Commission did not substitute the Commission's existing service quality standards as a contract term. The Arbitra-

tion Order provides in pertinent part, "U S WEST must comply with existing service standards ... [and] shall provide all industry standards currently relied upon for purposes of provisioning of service for purposes of including them in the ... agreement." Arbitration Decision and Order, at 72. The Arbitration Order did not relieve U S WEST of contractually imposed quality standards; rather, it substituted U S WEST's existing internal standards for those proposed by AT&T.

2. Issue 37a - Customer Information (No Reconsideration Requested)

3. Issue 37b - Customer Privacy (No Reconsideration Requested)

4. Issue 72 - Quality Management (No Reconsideration Requested)

5. Issue 73 - Service Order Process

116. U S WEST points to what it considers an internal inconsistency in the Arbitration Order. U S WEST states that on pages 22-23 of the Order the Commission determines that a standard ordering process for interconnection is necessary and directs the parties to revise AT&T's ordering processes in Attachment 5 to include a standard ordering process, yet the Commission rejects AT&T's proposed ordering processes--included in Attachment 5--on page 74 of the Order.

117. In both discussions of ordering processes, the Commission found that the parties should implement a standard procedure. We rejected AT&T's Attachment 5 ordering processes because the performance requirements and completion intervals assumed a higher standard of service than U S WEST provides itself and because electronic provisioning formats related to the long-term OSS electronic interface solution were not possible with U S WEST's initial interface.

118. To clarify, we rejected Attachment 5 as proposed by AT&T because it imposed a higher level of service quality than U S WEST must provide under the Act. The parties are to develop a standard ordering format for interconnection and unbundled network elements.

6. Issue 74 - Customer Usage Data (No Reconsideration Requested)

7. Issue 80 - Technical Publications (No Reconsideration Requested)

8. Issue 82 - Infrastructure Process (No Reconsideration Requested)

J. Dispute Resolution (Issues 65 and 66) (No Reconsideration Requested)

1. Issue 65 - Form of Dispute Resolution Agreement (No Reconsideration Requested)

2. Issue 66 - Arbitrator Fee Awards (No Reconsideration Requested)

K. Pricing for Unbundled Elements, Interconnection, and Collocation (Issues 42, 46, 67, 70-71)

119. **Depreciation Reserve Deficiency** - U S WEST requests reconsideration of the Commission's decision which bars recovery of its alleged depreciation reserve deficiency as a cost component of call termination and tandem switching. U S WEST argues that it introduced adequate record evidence to establish the amount of the reserve deficiency. It further contends that the Commission's decision violates the Act because it is not competitively neutral.

120. U S WEST argues that by not allowing recovery of the depreciation reserve deficiency from all users of the network, including competitive providers, U S WEST's customers will in effect be subsidizing AT&T's use of the network because U S WEST customers will have to pay the entire depreciation reserve deficiency. This "competitive neutrality" argument is spurious. Reconsideration of this issue is denied as the Order adequately explains and supports rejection of the depreciation reserve deficiency.

Determination of the Loop Price under the Hatfield Model

121. In light of both parties' extensive testimony relating to U S WEST's loop price, the record indicated that revising certain inputs to AT&T's Hatfield Model would improve the accuracy of the interim loop price determined by the model. Accordingly, as explained in the Arbitration Order, we requested AT&T to revise five specific inputs and rerun its model. We adopted this recalculated loop price--and subloop prices--for interim purposes. We requested the following modifications: (1) an increase in the corporate overhead factor from 10 to 14 percent, (2) a change of the structure sharing assumptions for buried and underground feeder and distribution cable from 33 to 66 percent, (3) an increase in the number of cables in each census block density group, (4) an increase of the network operations factor from 70 to 85 percent, and (5) a decrease in the number of special access lines.

122. AT&T claims these revisions are not supported by the record. U S WEST claims it made the identical revisions, reran the Hatfield Model, and calculated the monthly loop cost as $29.40, instead of the $27.41 AT&T calculated with the Commission's requested changes. U S WEST argues that this discrepancy highlights the deficiencies in the Hatfield Model.

123. We deny both parties' Motions for Reconsideration of these issues. AT&T has incorrectly analyzed the Commission's decision and U S WEST's recalculation of the loop rate at $29.40 does not match the actual revisions made. *See* U S WEST's Motion for Reconsideration, Attachment 2. Although we did not provide a detailed discussion in the Order on the revisions we requested, each of the revisions was based on evidence in the record. Our decision is explained in greater detail below.

124. **Corporate Overhead Factor** - AT&T originally looked at three different sources to develop an appropriate corporate overhead factor for U S WEST: (1) a regression analysis that developed a factor as a function of the total cost for 17 LECs (13.9 percent); (2) an amount equal to the overhead ratio experienced by AT&T (10 percent); and (3) the result of an examination of two other industries--the auto and airline industries (approximately 6 percent). AT&T chose 10 percent as a reasonable estimate of overhead expense that could be anticipated by an efficient company in a competitive environment. According to U S WEST, the 22 percent factor used in its cost studies is more appropriate.

125. The factor we adopted was based on AT&T's analyses of actual costs of 17 LECs. For this reason, we concluded this was a more reasonable factor than either AT&T's 10 percent or U S WEST's unsupported 22 percent.

126. **Structure Sharing Assumptions** - AT&T's model assumed that whether feeder and distribution facilities are aerial, buried or underground, other utilities would always pay two-thirds of the cost of the facilities and U S WEST's share would be one-third. U S WEST argued that more accurate sharing percentages would be 50 percent for aerial, 88 percent for buried, and 100 percent for underground placement.

127. We generally adopted sharing percentages that represented a compromise between the two parties' positions. We adopted AT&T's 33 percent proposal for aerial installations, however, because it is likely that when U S WEST installs aerial facilities, it will pay only a small share of the installation with power and cable companies bearing the remaining costs. We adopted a 66 percent sharing assumption for both buried and underground facilities as a compromise between the parties' positions.

128. **Number of Distribution Cables per CBG Density Group** - U S WEST strongly refuted AT&T's method of determining the number of distribution cables per census block group density category. According to U S WEST, the Hatfield Model places less than half the number of lines that are in the U S WEST cost study.

129. AT&T acknowledged that the Hatfield Model overstates the number of lines in some distribution groups and understates the number of lines in others, but argued that on average it does a good job of determining the necessary number of lines. AT&T explained that it has developed an updated version of the Hatfield Model which makes a more refined calculation. This most recent version of the Hatfield Model was unavailable for our analysis here.

130. We agreed with U S WEST that the Hatfield Model probably understates the number of distribution cables in U S WEST's service area in Montana, but we were not persuaded that the number should be doubled. Therefore, we adopted a mid-point compromise position between U S WEST's and AT&T's numbers.

131. **Network Operations Factor** - According to AT&T, this factor reduces the per line network operations expense as reported in ARMIS data to reflect the fact that in a forward looking environment, these expenses will be lower than U S WEST's embedded expenses. U S WEST argued that AT&T provided no justification for adopting the value of 70 percent for the network operations factor and that this factor should be reset to 100 percent.

132. According to AT&T, it fully supported the use of its proposed 70 percent network operations factor. The Hatfield Model documentation provides evidence from a California proceeding in which a Pacific Bell employee testified that Pacific Bell's forward looking network operations expenses are 55 percent less than the current per line values computed from ARMIS data. AT&T moderated this reduction by reducing the expenses by 30 percent instead of 55 percent.

133. We agreed with AT&T that on a forward looking basis, U S WEST's network operations expenses per line will likely decline, so this factor should be less than 100 percent. In the Arbitration Order, we adopted a factor of 85 percent, which represented a mid-point compromise between AT&T's proposed factor of 70 percent and U S WEST's 100 percent.

134. **Number of Special Access Lines** - According to AT&T, the Hatfield Model uses ARMIS data to determine the number of U S WEST's special access lines in Montana. U S WEST contends that the ARMIS number includes digital special access lines on a per channel basis so that DS-1s are counted as 24 access lines and DS-3s are counted as 672 access lines. U S WEST argued that including these channels as lines artificially decreases the cost estimate for unbundled loops.

135. U S WEST recommended adjusting AT&T's number of switched access lines (46, 821) downward by dividing the non-switched digital special access lines by 24 (even though some of these non-switched digital special access lines are DS-3s). According to U S WEST, the result is 12,597.

136. In prefiled rebuttal testimony, AT&T's witness John Klick testified that the ARMIS data is appropriate because they count the number of lines and do not report the number of channels per access line that are actually used. AT&T Exhibit No. 14. During the hearing, however, Mr. Klick testified that ARMIS might actually report the number of channels being used as lines. Tr. 2/11, p. 72.

137. We adopted U S WEST's position on this issue because it appeared from Mr. Klick's testimony that AT&T was not sure how the ARMIS data used in the Hatfield Model treat digital special access. We concluded that U S WEST's attempt to adjust for this was reasonable for purposes of establishing interim rates.

Prices Adopted from the Hatfield Model

138. AT&T asks the Commission to clarify which prices from the Hatfield Model have been adopted as interim prices. The Commission adopted all the prices as proposed by AT&T that were derived from the Hatfield Model with the exception of the loop and subloop elements, including the NID, which were determined based on the Commission's revisions to certain inputs of the Hatfield Model. AT&T's proposed prices, determined by using the Hatfield Model and adopted in the Arbitration Order, include local switching, transport, tandem switching, signaling links, signal transfer points, and signal control points/databases. The Commission also adopted AT&T's proposal for interim local number portability. These prices are adopted as proposed by

AT&T's witness Arleen Starr in her testimony. *See* AT&T Exhibit 21. No further clarification is necessary.

Collocation Rates

139. AT&T asks the Commission to reconsider its decision adopting U S WEST's collocation rates. Although both parties proposed collocation rates, AT&T conducted no cost studies to determine collocation prices in this proceeding,[8] but instead recommended that this Commission adopt the physical collocation prices proposed by the Oregon Public Utilities Commission (PUC) staff in an Oregon PUC proceeding and the virtual collocation prices ordered by the Oregon PUC in the same proceeding.

140. U S WEST proposed collocation prices that it explains were developed in compliance with the FCC's TELRIC pricing rules. U S WEST also provided a comparison of interstate collocation prices of seven local exchange companies on an aggregate per DS-1 price basis. The comparison indicated that U S WEST's price proposals were reasonable.

141. The Commission adopted U S WEST's proposed collocation prices for interim purposes and indicated it would conduct an investigation of collocation costing/pricing practices and policies. The Commission also determined that the interim prices would be subject to a true-up once permanent rates were determined.

142. In its Motion for Reconsideration, AT&T argues that the Commission erroneously adopted collocation rates that are not based on forward looking costs. AT&T explains that although the Commission relies on U S WEST's proposed collocation rates, it did not provide any analysis to support its conclusion that U S WEST's proposed rates are based on acceptable TELRIC analysis. In addition, AT&T argues that the Commission did not address the issue of non-recurring charges for collocation in its Arbitration Order and indicated that U S WEST's excessive nonrecurring charges can result in a barrier to entry in violation of the Act and the FCC Interconnection Order and will impede economically viable competition.

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[8] The Hatfield Model does not calculate collocation prices.

143. U S WEST responds that AT&T's arguments should be rejected because the record does not contain any analysis to support AT&T's proposed rates. U S WEST claims its proposals were supported in the record with relevant cost studies.

144. AT&T argues that the Commission did not support its conclusion that U S WEST's rates are based on acceptable TELRIC analysis. However, the Commission has not concluded that U S WEST's rates are based on acceptable TELRIC analysis. If such a conclusion were made, the prices would likely have been adopted on a permanent, not an interim basis.

145. Moreover, AT&T admits it has not developed collocation rates for U S WEST specific to Montana, and instead relies on rates from an Oregon proceeding. It also makes no claims that its proposed rates are based on acceptable TELRIC analysis. U S WEST, on the other hand, has proposed rates in this case and has provided some supporting documentation for its proposals. AT&T did not adequately demonstrate that U S WEST's rates are not suitable for interim purposes. In addition, as explained in the Arbitration Order, the Commission has committed to opening a collocation costing/pricing docket. The Commission appropriately concluded that any collocation rates paid by AT&T to U S WEST will be subject to a true-up once permanent rates are determined in that docket. *See* Arbitration Decision and Order, at

1. Issue 42 - Pricing: Electronic Interfaces (No Reconsideration Requested)

2. Issue 46 - Pricing for Interim Number Portability

146. Despite our decision's conformance to FCC rules, U S WEST requests reconsideration of this issue because it has initiated a proceeding in the United States Court of Claims asserting that the FCC's rules for interim number portability are confiscatory and constitute an unconstitutional taking of U S WEST's property. That action has no bearing on the Commission's resolution of this issue at present, nor does the stay of portions of the FCC's Interconnection Order in the United States Court of Appeals for the Eighth Circuit. As previously explained, we consider the unstayed portions of the Interconnection Order controlling and therefore deny reconsideration of this issue.

3. Issue 67, Issue 70 and Issue 71 - Costs U S WEST May Recover, Transport Charges, and Charge for Establishing Network (No Reconsideration Requested)

L. Contract Term and Other Miscellaneous Provisions (Issues 78, 79)

1. Issue 78 - Contract Term.

147. Because AT&T will have rates developed without reference to SB 89 for the duration of this agreement, the contract term becomes very significant. *See infra* pp. 15-18. The Commission adopted U S WEST's proposed contract term of two years rather than the five years advocated by AT&T. In its request for reconsideration, AT&T again asks the Commission to adopt a five-year term to allow enough time for a resolution of other related issues.

148. AT&T disagrees with the Commission's statement that after two years, "many of the unanswered questions about the development of competition in Montana will no longer be speculative." AT&T asserts that if the Commission encounters difficulties in launching its service quality docket or if the long term solution to the problem of establishing electronic interfaces is not fully resolved within the first year of the contract term, it is unlikely the Commission will have enough experience under a competitive environment to answer the questions it believes it cannot answer now. In that case, according to AT&T, a new round of negotiations and arbitration is not likely to accomplish much more than will be accomplished in this proceeding and would result in a waste of the Commission's and the parties' resources without any competitive or customer benefit. AT&T maintains that the Commission should await experience under a competitive regime that includes all of the safeguards against nondiscrimination required by the Act. AT&T also argues that a new round of negotiations and potential arbitration should follow the development of permanent rates and allow sufficient time to gain experience under those rates. A five-year term will allow more time for AT&T to develop services under all scenarios permitted by the Act (resale, unbundled elements and facilities based).

149. We agree with AT&T that the next round of negotiations should do more than simply revisit the same issues presented in this proceeding, and that a longer term will likely allow enough time for many or all of these issues to be resolved, including permanent rates, service quality and OSS issues. We further agree that any subsequent negotiations between the parties for future interconnection agreements should not be just a rehash of issues in this proceeding. However, a five-year contract in an industry undergoing rapid change may be too

long. In order to get more meaningful results from competition, the Commission changes its initial decision upon reconsideration to three years.

2. Issue 79 - Definitions (No Reconsideration Requested)

RECONSIDERATION

150. U S WEST requests an additional reconsideration period if the Commission clarifies issues in a manner that is inconsistent with U S WEST's initial reading of the order as set forth in its motion. We deny this request as all matters for reconsideration should have been addressed in the motions for reconsideration.

ERRATA

151. AT&T states there is a typographical error in the Arbitration Order and that "the price for loop distribution (including the NID) based on the rerun of the Hatfield Model using the Commission's revised assumptions should be $20.41." AT&T's Petition for Reconsideration, at 6, note 15. The Order is correct; the $27.41 calculation was provided by AT&T to the Commission after making the revisions requested by the Commission and rerunning the model with such revisions.

152. The second sentence of the last full paragraph on page 85 of the Arbitration Order includes an incorrect citation. The sentence should have read as follows: "The method proposed by AT&T is the method set forth in ¶ 136 of the FCC's number portability order. *See* In the Matter of Telephone Number Portability, CC Docket No. 95-116 (June 27, 1996)."

CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST and AT&T are public utilities offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for

much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the Montana agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The 1996 Act permits either party to a negotiation pursuant to 47 U.S.C. § 251 to petition this Commission to arbitrate any open issues in the negotiation of an interconnection contract, according to the parameters included in 47 U.S.C. § 252(b)(1).

6. Arbitration by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(b)(4)(A) limits the Commission's consideration of a petition for arbitration to the issues set forth in the petition and the response and to imposing appropriate conditions as required to implement § 251(c) upon the parties to the agreement.

7. In resolving by arbitrating under 47 U.S.C. § 252(b) and imposing conditions upon the parties to the agreement, the Commission is required to (1) ensure that the resolution and conditions meet the requirements of § 251, including the FCC regulations prescribed pursuant to § 251; (2) establish rates for interconnection, services, or network elements according to the pricing standards in subsection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c). The resolution of the disputed issues in this Docket meets the requirements of 47 U.S.C. § 252(c).

8. The FCC's regulations adopted to implement § 251 of the Telecommunications Act of 1996 are binding on this Commission, except the sections relating to the pricing and the "pick and choose" rules which have been stayed by the U.S. Court of Appeals for the Eighth Circuit pending consolidated appeals.

9. The Commission properly decides all issues presented by the parties, including disputes regarding the form of the contract, the structure of the contract, and contract language.

Section 252(c) of the 1996 Act does not limit the matters that may be arbitrated by the Commission, except the express provision that requires state commissions to limit consideration to the issues set forth by the parties in the petition and the response. 47 U.S.C. § 252 does not limit the issues that the parties may request the Commission to arbitrate.

10. Sections 17 and 18 of Senate Bill 89, enacted by the 1997 Montana Legislature, do not apply to the permanent prices to be determined for the interconnection agreement which will result from negotiations and arbitration in this Docket.

11. Where the Commission has regulatory jurisdiction, it must apply federal law as well as state law, and where Congress has preempted state law, the Federal law prevails. *See* FERC v. Mississippi, 102 S.Ct. 2126 (1982).

ORDER

THEREFORE, based upon the foregoing, it is ORDERED that the issues presented for Commission reconsideration are resolved as set forth above and as follows:

1. The reconsideration requested by AT&T Communications of the Mountain States, Inc. and U S WEST Communications, Inc. is granted in part, denied in part and/or clarified as set forth in the body of this Order;

2. The rates for interconnection, services and network elements and for any other items so described in this Order and Order No. 5961b shall apply on an interim basis pending the outcome of an omnibus costing and pricing proceeding for U S WEST;

3. The sentence beginning on page six and ending on page seven of the Arbitration Order is amended to state, "Denial of the motion is preferable to compelling the sort of voluminous information requested by U S WEST, particularly where U S WEST did not argue persuasively that it would be prejudiced by failure to grant the motion."

4. The "pick and choose" provision in section 13 of the AT&T contract shall not be included in the parties' agreement;

5. Attachment 2, § 9.12 of the AT&T contract shall be modified to strike the last sentence and AT&T shall not be permitted to approve U S WEST filings to terminate or grandfather service offerings prior to submission of those filings to the Commission;

6. Attachment 4, § 4, requiring U S WEST to expand and overbuild to accommodate requests for dark fiber or unused transmission medium shall not be included in the parties' agreement;

7. Unless and until U S WEST offers Fractional DS1 and Hospitality Lines to its own customers in Montana, it need not offer them for resale; and

8. The contract term for the parties' interconnection agreement shall be three years.

IT IS FURTHER ORDERED that a single agreement incorporating the provisions of this Order and Order No. 5961b shall be filed with the Commission for approval within 45 days of service of this ORDER.

DONE AND DATED this 25th day of June, 1997, by a vote of 5 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
DAVE FISHER, Chairman

_____
NANCY MCCAFFREE, Vice Chair

_____
BOB ANDERSON, Commissioner

_____
DANNY OBERG, Commissioner

_____
BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.